IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1343

COMPANIA ANONIMA VENEZOLANO DE NAVEGACION,

Petitioner,

versus

WILLIAM H. MATTHEWS and
J. P. FLORIO & CO., INC.,

Respondents.

OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, William Matthews, respectfully prays that this Honorable Court reject petitioner's application for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in proceedings numbered 22,220 of the docket of said court, affirming the judgment of the United States

District Court for the Eastern District of Louisiana, New Orleans Division, Honorable Herbert W. Christenberry, Judge, presiding.

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported at 371 F. 2d 971 and a copy is annexed to the petition as "Appendix A". The findings of the District Court are reported at 234 F. Supp. 553 (1964).

JURISDICTION

The jurisdiction of this Court, as stated by petitioner, is conceded.

QUESTIONS PRESENTED

The questions raised by petitioner, on page 2 of its petition, are presented by *petitioner* as follows:

(A) Does the decision of the Court of Appeals conflict with the rule and decision of this Court in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Company, Inc.*?

(B) Does the decision of the Court of Appeals directly conflict with the decisions of other Circuits, and should it accordingly be reviewed by the Supreme Court?

(C) Did the District Court and the Circuit Court of Appeals fail to make crucial findings of fact?

Respondent Matthews, the injured longshoreman herein, has no direct interest in the recovery over by the shipowner against the stevedore. Hence, QUESTIONS (A) and (B) supra, relating solely to recovery over, will be touched upon only lightly, en passant. With reference to Matthews, the only "QUESTION" purportedly presented by the petition is (C) above, relative to the alleged failure of the District and Circuit Courts to "make crucial findings of fact."

STATEMENT OF THE CASE

As noted by the Fifth Circuit in its opinion herein: "Beaten on the facts, the shipowner turns hopefully to the law books, . . ." etc., (371 F. 2d 971.) In its application for certiorari here, however, petitioner has presented the factual issues in such unrecognizable form, that it is necessary to refer rather extensively to the findings of the District Court as they appear at page 972 of 371 F. 2d:

"The following facts, as found by the district court, were *clearly established* by the evidence:

II.

The libellant was engaged in the stowage of cargo *in one of the hatches* of said vessel.

III.

Libellant and his co-workers found, upon the removal of the hatch covers, *a large quantity of loose dunnage which had come into port with the vessel.* This dunnage was piled unevenly and loosely, about 2

feet to 4 feet high, and *covered over with brown paper.*

IV.

Libellant and his co-workers *requested that the dunnage be removed.* These requests were transmitted by Florio employees to the vessel's mate in charge of stowing cargo. THE MATE ORDERED THAT THE DUNNAGE REMAIN IN THE HOLD, AND THAT LIBELLANT AND HIS CO-WORKERS BUILD CARGO TO THE HEIGHT OF THE DUNNAGE AND WORK OVER IT. They were further ordered to build up to the height of the dunnage in the square of the hatch.

V.

Libellant was required to stow cargo over the loosely piled paper covered dunnage, and to do so it was necessary that libellant walk over the paper covered dunnage. Libellant was unable to stow cargo as ordered without walking over and on the dunnage.

VI.

While libellant and a co-worker carried cargo for stowage over the covered dunnage, as ordered, libellan't right foot and part of his right leg went through the paper covering into a concealed hole or separation in the loose dunnage. The hole or separation into which libellant fell was created by the loosely piled condition of the dunnage, was covered by paper, could not be seen by libellant, and constituted a trap.

VII.

Loosely piled and covered dunnage must be removed before stowage of cargo to assure a safe footing for longshoremen.

VIII.

EIGHT WITNESSES AND THE LIBELLANT TESTIFIED TO THE ABOVE FACTS, AND NOT ONE WITNESS CONTRADICTED THEIR TESTIMONY.

IX.

A qualified expert on seamanship testified without contradiction that the method employed by the respondent herein on the date of libellant's injury was unsafe.

X.

J. P. Florio & Co. Inc., did not cause the condition that resulted in the accident and injury, and *had no control over the vessel*, the dunnage or paper covering over the dunnage, prior to the accident and injury.

XI.

The presence of the loose, covered dunnage in the hold during loading operations, for which the vessel alone was responsible, rendered the vessel unseaworthy, and created an unsafe place for libellant to work. Libellant was injured as a proximate result of such unseaworthiness and unsafe condition.

XII.

The unseaworthiness of the vessel and the failure of the respondent to provide libellant with a reasonably safe place to work were the sole and exclusive legal causes of the accident and libellant's resulting injury, no negligence being legally attributable to libellant." (Emphasis added)

The balance of the findings of fact deal primarily with quantum, which is not challenged here.

ARGUMENT

RESPONSE TO QUESTION (C), supra — INADEQUACY OF FINDINGS BY DISTRICT COURT & CIRCUIT COURT

As noted in bare outline below, the "ship" here pursued an erratic and zigzag course, as did the merchant vessel in World War II when cruising in dangerous waters. The danger here to the "instant ship" is the relentless and implacable foe: the submarine of truth. The chase is at an end, we trust, and this should be the final shot.

RULE AS TO ADEQUACY OF FINDINGS:

The Fifth Circuit, in quickly disposing of this third "Question" ((C) supra) cited several cases, none of which states the rule more clearly nor any differently than the statement in *GYPSUM CARRIER, INC. V. HANDELSMAN*, C.A. Cal. 1962, 307 F. 2d 525:

> "Findings in admiralty should be sufficiently specific to permit fair appellate review of

the manner in which the trial court resolved issues upon which its judgment depends; but error in regard to specificity of findings MUST BE PREJUDICIAL TO JUSTIFY REVERSAL." (Emphasis added)

The complete lack of prejudice here quo ad the findings is demonstrated, first of all, by the fact that the *"when"* and the *"where"* of the accident was an *afterthought* which only crept into the case as a flimsy barrier of defense. Quite obviously, the District Court, brushed aside this counterfeit query as to "where" the accident happened in Finding II, supra. Despite the last minute desperate efforts by the shipowner to inject a frivolous fact issue, the District Court simply stated:

> "The libellant was engaged in the stowage of cargo *in one of the hatches of said vessel.*" (Emphasis added)

Obviously, the Fifth Circuit found neither *lack of specificity* nor any *requisite prejudice* to warrant the shipowner's complaint. The libel had not specified in which hatch the accident had occurred. (R. 2, Articles V and VI) Nor did the shipowner's answer raise or challenge the *"where"* or *"when"* issue in the slightest perceptible manner. On the contrary, after a simple denial of Articles V and VI, supra, the ship agreeably "went along" with the description of the broad "where" of the accident by stating that Matthews had been injured:

> *"* * * in one of the vessels holds."* (R. 10)

It was not until Matthews himself had testified, and after all of his eight witnesses to the accident had been heard, that there was raised the issue as to which hatch was involved. This issue was raised for the first time, when Matthews was being cross examined regarding a statement he had made in a deposition, in which he had said, long before trial, that the accident occurred in hatch No. 4 (R. 480).

All other witnesses who made any mention of *which hatch* was involved as the situs of the accident had described it as being Hatch (or hold) No. 2. There was no conflict at trial about this point at all because, immediately after Matthews was confronted with his deposition reference to Hatch No. 4, supra, the Court itself disposed of this inconsequential discrepancy as follows:

> "The Court: Look, are you sure it was Number 4 hatch?
> The Witness: *That's my recollection.*
> The Court: You can't be mistaken?
> The Witness: *I COULD BE MISTAKEN ABOUT WHAT HATCH I WAS IN.*" (R. 480)

MATTHEWS WAS THE *LAST* WITNESS TO THE ACCIDENT CALLED BY THE LIBELLANT. (Index of witnesses R. 422).

There was no serious challenge made on this point to any witness, before or after the testimony of Matthews as to "where" the accident happened. Realizing that the *inside* of any hatch looks much the same to a longshoreman preoccupied with his personal problems, (plus the time lag between the discrepancy as to

Hatch number given at deposition long before the trial) the Court let the matter drop with the single, above quoted passage.

THE PARALLEL DEVICE OF CONFUSION AS TO "WHERE" THE ACCIDENT HAPPENED

As just noted, the petitioner, surrounded by the testimony of eight uncontradicted witnesses as to which numbered hatch or hold was the situs of the accident, did not make the slightest discernible impression upon either the District Court or the Fifth Circuit. Shifting to an even more transparent device, the shipowner sought to pull off a sort of "hidden ball" play based upon a document referred to as the "Commodity Handling Report" or "Work Sheet" (R. 536).

We say that this document was used in a hidden ball play in a very appropriate sense:

First of all, the document was one made in the course of business of the stevedore, Florio, and was used as a means of bringing in a mass of strictly hearsay evidence via Florio's superintendent Schroth. (R. 531) But, in some sort of undetectable "hand off" play, the shipowner ended up with the "ball" seeking to score two touchdowns simultaneously. The document was sought to be used as a means of discrediting the claim of unseaworthiness (quo ad Matthews) and establishing the validity of the recovery over against Florio. To depart from the gridiron figure of speech, this audacious maneuver amounted to this:

Both the shipowner and the stevedore, Florio, produced a grand total of ONE LIVE WITNESS, Florio's superintendent Schroth. (R. 531)

Another witness, Garcia, a mate, appears only by way of deposition. The testimony of both of these witnesses may be characterized as largely hearsay. Thus:

AS TO SCHROTH — THE SUPERINTENDENT

Schroth admitted that he did not recall if he was on duty on the day of the accident. Besides giving his name, his job title and his general knowledge of the overall facts of life from the view point of a superintendent, he contributed very little factual information to the case. (R. 532)

About midway in his testimony, the Court realized that Schroth was not actually relating factual knowledge of his own but was relying almost entirely upon what was supposed to be reflected by a document described interchangeably as the "Commodity Handling Report" or the "work sheets." He was reeling off information from the "Commodity Handling Report" which he held in his hand, when the Court stopped him with the query:

> "The Court: You can't remember? You're reading this from this document?" (R. 536)

The Court then noted that Schroth had not made the report himself (R. 536). As otherwise developed it was elsewhere admitted by Schroth that he did not know who made up or filled in the document. (R. 586)

It was not even signed, it was covered with erasures and the only actual identification of it was the fact that it was made out on a printed form and the entries corresponded with the general facts of the accident. (R. 603)

The offer of this "Commodity Handling Report" or "worksheet" was somewhat belatedly objected to, once it was discovered how weak the identification was under either the "shop book rule" or the Business Records Act (28 USCA Sec. 1732).

The Court allowed the offer of this document in evidence, obviously on a very tentative and qualified basis "for whatever it was worth". (See rule of HARTZOG V. U.S. 217 F.2d 706)

But the Court could not have thought the "Commodity Handling Report" amounted to much, as actual evidence, because it is not even discussed in the Findings, either at the District Court level or Fifth Circuit level. Neither Court was bemused, by the deception essayed by this device. The "Commodity Handling Report" defense amounted, in general to this sort of argument:

The accident could not have happened in the lower hold as all the eyewitnesses said it did:

(a) Because the lower hold must have been covered over at the time that the Matthews gang was working and consequently they could not have been down there;

(b) There was no distinction made, in some of the testimony by the eyewitnesses (longshoremen), as to

whether they were referring to the 'tween deck area or the lower hold.

This argument, based upon a document which simply cannot stand intelligent inspection, is as flimsy as a child's paper boat.

Nevertheless, should this totally discredited and bedraggled "report" (which was unnoted by either court below,) be examined by this Court, along with, or apart from the mass of other exhibit material, it will surely be found to have an internal contradiction which defies an answer. For, if the lower hold was closed over at the time shown thereon, then *another longshore gang,* working somehow in this tomblike, sealed-off hold, (Exhibit F-11) must have been suffocated.

A realistic answer suggests itself: Nobody died from lack of air and the "which deck" argument is simply blown away by the strong winds of cold reason.

"WHEN" THE ACCIDENT HAPPENED

One of petitioner's complaints as to the District and Circuit Courts alleged failure to make "crucial" findings refers to "when" the accident happened. Nothing in petitioner's application is more frivolous. The Florio "Accident Report" (Exhibit F-13) and the testimony of all of the eyewitnesses shows that the accident happened sometime after 8 A. M. and before Noon on October 18, 1959. The time is pin-pointed at approximately 9:30 A. M. by most of the longshoremen and the time, "9:30 A. M." is noted on the face of the Florio

"Accident Report" itself. We shall not devote further comment to this "question."

AS TO GARCIA, THE DEPOSED MATE

At the outset, in discussing the "Questions" presented by the application for certiorari, we stated that we would touch only lightly on the issue of the claim over by the shipowner against the stevedore. Ironically, the shipowner which here complains of lack of specificity as to the Findings fails to come forward with the slightest explanation in any Court as to why the testimony of the *wrong mate* was produced to support the claim over.

What the mate did and said and, the orders given by him, related to the sole issue which the Fifth Circuit said is controlling as a distinction between *Italia* and the other cases.

Yet Garcia, the only mate who testified (via deposition and before the confusing maneuvers could be detected in detail) *was obviously the wrong mate.* He went off duty at 8 a.m. (Garcia deposition.) The Matthews gang did not report for duty until that precise time, 8 a.m. (R. 483) Garcia, therefore was absent, not only from the Courtroom but from the scene of all the action when the crucial and controlling orders were given as to what should be done with the dunnage, etc. Garcia states that he does not recall any such orders. No wonder. Another mate gave the orders. We received no "message 'from' Garcia."

CONCLUSION

William Matthews has had to endure a great deal of misfortune, over and above the gross negligence of the shipowner and the resulting crippling injury which, among other things, required *two laminectomy operations*. He has also suffered by the additional bad luck of having his obviously just award delayed for an unreasonably long time by:

(a) The evasive and confusing tactics of the shipowner in the District Court, the Fifth Circuit and here; and

(b) The delay of more than one year in preparation of the transcript for appeal, when the Court stenographer unaccountably "misplaced" his notes and quit the Court's employ.

The accident here occurred on *October 18, 1959*, and suit was filed *October 14, 1960*. Trial on the merits was finally reached on *October 28th and 29th, 1963*.

The District Court rendered its decree in favor of Matthews on *October 14, 1964*, and the Fifth Circuit affirmed the decree on *January 31, 1967*. The record reflects (R. 423) that on the date of accident Matthews was 36 years old, the father of eight children and for a period of three years preceding his injury, he had earned more than $5,300 annually. His income since that time has never reached $2,600 (a year) and now, although MORE THAN SEVEN YEARS HAVE PASSED SINCE HE WAS TOTALLY AND PERMANENTLY DISABLED, Matthews continues to wait.

For the reasons set forth in the District Court's Findings of Fact and, for those stated hereinabove, it is respectfully submitted that petitioner's application for certiorari should be denied. In the alternative, should the Court decide to review the claim for recovery over against the stevedore, Florio, we sincerely submit that William Matthews should not be penalized by any further denial of recovery. Any writ granted herein should be restricted to the sole issue of recovery over.

Respectfully submitted,

John P. Dowling

John P. Dowling,
Attorney for Respondent
William H. Matthews

PROOF OF SERVICE

I, John P. Dowling, attorney for respondent, William H. Matthews, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition to Petition for Writ of Certiorari on Leon Sarpy, Esquire, National Bank of Commerce Building, New Orleans, Louisiana, and A. R. Christovich, Jr., Esquire, American Bank Building, New Orleans, Louisiana, by mailing the same, United States postage prepaid, addressed as hereinabove set forth.

New Orleans, Louisiana, May 17th, 1967.

John P. Dowling

John P. Dowling